# Kumarasamy & Ors v Revathy Development (M) Sdn Bhd

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 507 OF 1985
MOHD GHAZALI JC
8 SEPTEMBER 1994

***Civil Procedure*** *— Trial — Breach of contract — Oral application to declare agreement had expired through effluxion of time — Whether separate trials of separate issues should be granted — Whether there were special grounds — Rules of the High Court 1980 O 33 r 2*

***Contract*** *— Breach — Time of the essence — Oral application requesting court to declare agreement had expired through effluxion of time — Whether separate trials of separate issues should be granted — Whether there were special grounds — Rules of the High Court 1980 O 33 r 2*

The plaintiffs, who were the registered proprietors of nine pieces of land ('the lands') and the defendant, a private company entered into a joint venture agreement ('the agreement') with the defendant for the development of the lands into a housing estate. Under the terms of the agreement, the defendant undertook, inter alia, to ensure that approval for the conversion of the use of the lands and for the sub-division and the layout plan for development ('the necessary approvals') was obtained within three years of the date of the agreement. It was also agreed that the plaintiffs would grant an extension of six months to the defendant at the end of the three years upon proof that the defendant's application for the necessary approvals had been duly submitted to the relevant authorities and was pending.

The parties agreed that if the necessary approvals were not obtained by the defendant within the stipulated period or if the appropriate authorities disallowed or refused to give the necessary approvals, the plaintiffs would be entitled to terminate the agreement. The agreement would then be null and void and cease to have any further force or effect. When the agreement expired, the defendant had yet to obtain any of the necessary approvals for the said development and neither did they apply for the six-month extension.

The plaintiffs filed an originating summons seeking, inter alia, a declaration that the agreement was terminated through effluxion of time and the parties had no claim against each other. At the outset of the hearing, counsel for the plaintiffs made an oral application under O 33 r 2 of the Rules of the High Court 1980 requesting the court to evoke the said rule, to put forth the question to be decided and declare that the agreement had expired through effluxion of time.

**Held**, allowing the application:

(1) Once the necessary approvals were not obtained within 3 or 3½ years, both parties were relieved from the obligations which remain unperformed. The question posed, if tried separately, may dispose of the matter without the need to go for trial. If it was decided at the outset that the agreement had expired through effluxion of time, neither party need perform any of their obligations and neither party should have any claim against the other.

(2) Even if the plaintiff's application was allowed, and the court orders the preliminary issue to be tried first, and then decides in the affirmative, it does not necessarily dispose of the action in its entirety as after the trial of the preliminary issue, the court still has a discretion in making any order as may be just. However, separate trials of separate issues should only be granted on special grounds. In this case, it was clear that time was a condition precedent of the whole agreement. If the defendant had actually made submissions to the appropriate authorities for the necessary approvals but was unsuccessful at the end of the three years, the plaintiffs should be in a position to terminate the agreement and treat it as being void. These constitute special grounds for allowing the application. Therefore, the question posed was likely to be decisive of the litigation and the oral application of the plaintiffs was allowed.

**[Bahasa Malaysia summary**

Plaintiff, yang merupakan pemunya berdaftar sembilan bidang tanah ('tanah itu') dan defendan, sebuah syarikat persendirian, telah mengikat suatu perjanjian usahasama ('perjanjian itu') dengan defendan untuk membangun tanah itu supaya menjadi sebuah estet perumahan. Di bawah terma perjanjian itu, defendan telah berakujanji, antara lain, untuk memastikan supaya kelulusan untuk penukaran penggunaan tanah itu dan untuk pemecahbahagian dan pelan susun atur untuk pembangunan ('kelulusan yang perlu itu') diperolehi dalam masa tiga tahun dari tarikh perjanjian itu. Juga telah dipersetujui bahawa plaintif akan memberi suatu perlanjutan masa selama enam bulan kepada defendan pada penghujung tiga tahun itu atas bukti bahawa permohonan defendan untuk kelulusan yang perlu itu telah diserahkan seperti yang sepatutnya kepada pihak yang relevan dan masih belum selesai.

Pihak-pihak telah bersetuju bahawa jika kelulusan yang perlu itu tidak diperolehi oleh defendan dalam masa yang ditetapkan atau jika pihak yang berkenaan tidak membenarkan atau enggan memberi kelulusan yang perlu itu, plaintif berhak menamatkan perjanjian itu. Perjanjian itu akan menjadi batal dan tidak sah dan tidak akan berkuatkuasa lagi. Apabila perjanjian itu tamat tempohnya, defendan belum lagi memperolehi kelulusan yang perlu itu untuk pembangunan

itu dan mereka juga tidak memohon untuk pelanjutan masa selama enam bulan itu.

Plaintif telah memfailkan suatu saman pemula untuk mendapat, antara lain, suatu deklarasi bahawa perjanjian itu telah ditamatkan melalui peluputan masa dan pihak-pihak tidak mempunyai tuntutan terhadap satu sama lain. Pada permulaan pendengaran itu, peguambela plaintif telah membuat suatu permohonan lisan di bawah A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 meminta supaya mahkamah menimbulkan kaedah itu, untuk membentangkan soalan itu dan mengisytiharkan bahawa perjanjian itu telah luput masa.

**Diputuskan**, membenarkan permohonan itu:

(1) Apabila kelulusan yang perlu itu tidak diperolehi dalam tempoh 3 atau 3½ tahun, kedua-dua pihak dibebaskan daripada obligasi yang masih belum dilaksanakan. Soalan yang dikemukakan boleh diselesaikan tanpa dibicarakan jika ianya dibicarakan secara berasingan. Jika ianya diputuskan dari mula lagi bahawa perjanjian itu telah tamat tempohnya kerana luput masa, kedua-dua pihak tidak perlu melaksanakan obligasi mereka dan tidak mempunyai tuntutan terhadap pihak yang lain itu.

(2) Meskipun permohonan plaintif dibenarkan, dan mahkamah memerintah supaya isu permulaan itu dibicarakan terlebih dahulu, dan mahkamah memberi keputusan yang mengiakan, ia tidak semestinya menyelesaikan keseluruhan tindakan itu kerana selepas perbicaraan isu permulaan itu, mahkamah masih mempunyai bidang kuasa untuk membuat sebarang perintah yang difikirkan adil. Akan tetapi, perbicaraan yang berasingan untuk isu yang berasingan hanya akan dibenarkan atas alasan yang istimewa. Di dalam kes ini, adalah jelas bahawa masa merupakan suatu syarat yang amat penting di dalam keseluruhan perjanjian itu. Jika defendan sememangnya telah menyerahkan permohonan itu kepada pihak yang sewajarnya untuk mendapat kelulusan yang perlu itu tetapi tidak berjaya pada penghujung tiga tahun itu, plaintif sepatutnya berkedudukan untuk menamatkan perjanjian itu dan menyifatkannya sebagai tidak sah. Ini merupakan alasan yang istimewa untuk membenarkan permohonan itu. Oleh itu, soalan yang dikemukakan akan menentukan kesudahan litigasi itu dan permohonan lisan plaintif dibenarkan.]

[*Editorial Note*: The defendant has appealed to the Court of Appeal.]

**Cases referred to**

*Carl Zeiss Stiftung v Herbert Smith & Co & Ors* [1969] 1 Ch 93; [1968] 2 All ER 1002; [1968] 3 WLR 281 (refd)

*Lombard North Central plc v Butterworth* [1987] QB 527; [1987] 1 All ER 267; [1987] 2 WLR 7 (refd)

*Piercy v Young* (1880) 15 Ch D 475 (refd)

**Legislation referred to**

Contracts Act 1950 s 56(1)
Specific Relief Act 1950 ss 20(1)(a), (g), 23
Rules of the High Court 1980 O 15 r 16, O 33 rr 2, 3(1), 5

*S Balarajah* and *Julie Lim* (*Balarajah & Co*) for the plaintiffs.
*S Seeralan* (*Mahadevi Ganeshmurugan & Co*) for the defendant.

**Mohd Ghazali JC**: The plaintiffs are the registered proprietors of nine pieces of land (hereafter referred to as 'the said lands') of approximately 42 acres and situated in the Mukim of Pulai, in the state of Johor, and the defendant is a private company incorporated in Malaysia.

By an agreement dated 14 November 1981 (hereafter called 'the said agreement'), the plaintiffs agreed to enter into a joint venture with the defendant for the development of the said lands into a housing estate to be called Taman Sri Mahaletchumi. By the said agreement, the plaintiffs put forth the said lands as their portion of the investment to develop the said lands and the defendant agreed to be liable for all monetary outlay for the actual development of the housing project. The development was agreed to be in accordance with a layout plan to be prepared by an architect, consultant or surveyor appointed by the defendant.

Under the terms of the said agreement, the defendant undertook and agreed to do, inter alia, the following:

(a) to obtain the necessary sub-division of the said lands with separate titles and the planning approvals;

(b) to bear and pay for all expenses, premiums, survey fees, costs and expenses in respect of the conversion of the category of land use; and

(c) to ensure that the approval for the conversion of the use of the said lands and the approval for the sub-division and the layout plan for development (hereafter referred to as 'the necessary approvals') shall be obtained within three (3) years of the date of the said agreement, that is, on or before 13 November 1984.

It was further agreed under the said agreement that the plaintiffs would grant an extension of six months to the defendant at the end of the three years upon proof that the defendant's application for the necessary approvals had been duly submitted to the relevant authorities and was pending.

By cl 8 of the said agreement, the parties agreed that if for any reason the necessary approvals were not obtained by the defendant within the stipulated period mentioned hereinabove or if for any reason the appropriate authorities shall disallow or refuse to give the necessary approvals as aforesaid, then the plaintiffs shall be entitled to terminate the said agreement.

Upon termination as aforesaid, it was agreed that the said agreement shall be null and void and cease to have any further force or effect and the plaintiffs shall be entitled to the return of the issue documents of title to the said lands and neither party shall thereafter have any claims against the

A other in respect of the said agreement, in particular, for moneys already expended by the defendant which it was agreed could not be recovered from the plaintiffs.

It was also a term of the said agreement that the plaintiffs were only obliged to render vacant possession of the said lands to the defendant B within three months of receipt of a written notification from the defendant that the necessary approvals had been obtained and that the premiums for the conversion of the said lands had been duly paid.

When the said agreement expired on 14 November 1984, the defendant had yet to obtain any of the necessary approvals for the said development as envisaged by the parties, neither did the defendant make C any written application to the plaintiffs for the six-month extension as provided for under the said agreement.

In August 1985, the plaintiffs filed an originating summons in the Johor Bahru High Court against the defendant seeking the following:

D (i) a declaration that upon a true and proper construction of cll 7 and 8 of the said agreement, the defendant agreed to and was obliged to obtain all the necessary approvals within 3 or 3½ years as the case may be;

(ii) a declaration that upon a true and proper construction of cl 8 of the said agreement, if for any reason the necessary approvals were not E obtained or were disallowed or refused by the relevant authorities within the 3 or 3½ years as the case may be, the plaintiffs were entitled to terminate the said agreement whereupon the said agreement was deemed cancelled, null and void and ceased to have any further force or effect and neither party shall have any claim against the F other;

(iii) a declaration that as the necessary approvals were not obtained within the time envisaged and agreed, the said agreement was terminated through effluxion of time and that the parties thereto shall have no claim against each other; and

G (iv) that upon a true and proper construction of the said agreement, in particular, cl 11, the defendant did not and had no proprietary rights to the said lands and that the defendant had only an anticipatory right to 70% of the total number of houses of each type agreed to be constructed on the said lands after completion.

H On 9 December 1985, the High Court, Johor Bahru ordered that the proceedings were to be continued as if the matter had begun by writ and that the affidavits do stand as pleadings. Pursuant to the said order, the plaintiffs filed a statement of claim dated 22 January 1990 and prayed for the same declarations as stated above.

I The defendant filed a lengthy statement of defence contending that the plaintiff had unilaterally and arbitrarily without reasonable cause, on 2 July 1983, terminated the said agreement. The defendant also made a counterclaim for loss and damages as the plaintiffs had breached the said agreement, namely, that they had:

(a) failed to disclose that there are 75 caveats lodged against the said lands; the defendant would contend that it was a term either expressed or implied that the said lands should be free from encumbrances and with the existence of the caveats, the land office would not consider any application for the necessary approvals; A

(b) refused to deliver the issue documents of title in breach of cl 3 of the said agreement upon execution; B

(c) refused to execute a power of attorney so as to facilitate the applications to obtain the necessary approvals from the relevant authorities; and

(d) refused to execute Form 12A as provided for under the National Land Code 1965 for an application for approval of surrender of the land for the purposes of sub-division and that without the necessary approvals, the defendant would not be eligible to apply for a developer's licence from the relevant authorities. C

At the outset of the hearing, counsel for the plaintiffs made an oral application under O 33 r 2 of the Rules of the High Court 1980 requesting the court to evoke the said rule and to put forth the question to be decided pursuant to the said rule, namely: D

> That on a true and proper construction of an agreement dated 14 November 1981 entered into between the plaintiffs as landowners and the defendant as developers and noting the purport and intent of cll 7, 8, 9 and 35 therein it is declared that the said agreement has expired through effluxion of time. E

Order 33 r 2 reads:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. F

Consequently, O 33 rr 3(1) and 5 read:

> 3 (1) In every action begun by writ, an order made on the summons for directions shall determine the mode of the trial; and any such order may be varied by a subsequent order of the Court made at or before the trial. G
>
> 5 If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just. H

Counsel for the plaintiffs submitted that the circumstances and the facts of the case at hand were such that if the aforesaid issue was determined by the court at the outset, the whole action would be disposed off expeditiously thus saving much time and costs. He submitted that the court has power I to try a preliminary question of law at the outset and may order such a question to be tried on the pleadings or, on a case stated or an agreed statement of facts, at any time during the proceedings.

A He contended that the plaintiffs have, inter alia, sought in their statement of claim for a declaration that the said agreement, which formed the subject matter of this dispute, was terminated through effluxion of time, and hence, the determination of the aforesaid issue at the commencement of the trial would have the beneficial effect of expediting B the hearing of the substantial issue in the action, eliminating the need for the discovery of documents and evidence on the other issues and producing a substantial saving of costs.

He further contended that it had been expressly agreed under cl 38 of the said agreement that time, wherever mentioned, should be of the C essence. Furthermore, the said agreement fell within the categories of contracts under s 20(1)(a) and (g) of the Specific Relief Act 1950 which reads:

> The following contracts cannot be specifically enforced:
>
> (a) a contract for the non-performance of which compensation in money is D an adequate relief;
>
> (g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;

Counsel also argued that s 23 of the Specific Relief Act 1950 bars specific E performance of the said agreement in the instant case. Section 23 reads:

> Specific performance of a contract cannot be enforced in favour of a person —
>
> ...
>
> (b) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed;
>
> F ...

In support of his application, counsel referred to the case of *Carl Zeiss Stiftung v Herbert Smith & Co & Ors* [1969] 1 Ch 93 at p 98; [1968] 2 All ER 1002 at p 1004; [1968] 3 WLR 281 at p 285, where the judge said:

> G The true rule was stated by Romer LJ in *Everett v Ribbands* [1952] 1 KB 112; [1951] 2 All ER 818:
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> > 'Where you have a point of law which, *if decided in one way*, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings, or very shortly after the close of pleadings.' (Emphasis
> H added.)

Counsel also cited the case of *Lombard North Central plc v Butterworth* [1987] QB 527 at p 535; [1987] 1 All ER 267 at pp 271–272; [1987] 2 WLR 7 at p 13 where Mustill LJ said:

> I 5 A stipulation that time is of the essence, in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach.

6 It follows that where a promisor fails to give timely performance of an obligation in respect of which time is expressly stated to be of the essence, the injured party may elect to terminate and recover damages in respect of the promisor's outstanding obligations, without regard to the magnitude of the breach.

Counsel for the plaintiffs then pointed out that in his statement of claim, there is no prayer for special damages and that this is in accordance with the said agreement. He argued that the issue before the court is the construction of the said agreement which is exhibited in the affidavits in support of the originating summons and the crux of the case depends on the construction of cll 7 and 8 of the said agreement. He submitted that if his application is allowed it will save time and costs and abate unnecessary litigation. He then informed the court that he is not pursuing his prayer as to damages by virtue of what is contained in cl 8 of the said agreement. He concluded that if the court allows his application the whole case can be disposed off.

In reply, counsel for the defendant submitted that his statement of defence shows particulars of breach of the said agreement by the plaintiffs and also particulars of their negligence. He also submitted that the defendant had added a counterclaim for general and special damages as they had expended money in attempting to fulfil their obligations under the said agreement, namely, to obtain the necessary approvals from the relevant authorities. He also argued that, alternatively, both parties had entered into a second agreement, founded on several documents and also orally, wherein the plaintiffs agreed to allow the defendant to complete the project and wherein time was not of the essence. The plaintiffs have however denied that such an agreement existed. Counsel for the defendant then argued that as the court had earlier ordered that the proceedings be continued as if the matter had begun by writ, there should be a trial but be that as it may, he leaves it to the court to decide.

To me, the best approach to this oral application by the plaintiffs is to look at cll 7 and 8 of the said agreement which reads:

7 All expenses, premiums, survey fees, costs and expenses in respect of conversion of the category of land use, layout amalgamation and sub-division or re-alienation upon surrender of the said land as aforesaid including all other outgoings in respect of obtaining separate issue documents of title for building purposes in accordance with the approved layout plan shall be borne and paid by the developer and it is hereby agreed by the parties hereto that the developer shall ensure that approval for conversion, layout and sub-division in respect of the said land shall be obtained within three (3) years from date of execution of this agreement provided always that the developer shall be entitled at the expiration of the said three (3) years from date hereto to request for an extension of time of half a year to complete the application for layout and conversion and sub-division and such request shall be granted by the owner upon proof that the application has been duly submitted but is pending approval.

> 8 If for any reason the approval for conversion layout or sub-division of the said land is not obtained by the developer within 3 years or 3½ years as the case may be from date of execution of this agreement or if for any reason the appropriate authorities shall disallow or refuse to approve the said conversion, layout or sub-division as aforesaid then the owner shall be entitled to terminate this agreement whereupon this agreement shall be null and void and cease to have any further force or effect and the owner shall be entitled to the return of the issue document of title to the said land and neither party shall thereafter have any claim against the other in respect of this agreement in particular for moneys already expended by the developer which cannot be recovered from the owner.

Clauses 7 and 8 are explicit, namely, the defendant, at their own expense, ensured that the necessary approvals shall be obtained within three years from 14 November 1981 and that the defendant shall be entitled to an extension of six months upon proof that the applications are pending approval. At the end of the 3 or 3½-year time-frame as stipulated, if the necessary approvals have not been obtained, the plaintiffs are entitled to terminate the said agreement and it shall be null and void and neither party shall thereafter have any claim against the other. Furthermore cl 38 of the said agreement reads: 'Time wherever mentioned in this agreement shall be of the essence.'

In my view, the contentions of counsel for the plaintiffs are well-founded, namely, the root of the said agreement is found in cll 7, 8 and 38. Once the necessary approvals are not obtained within 3 or 3½ years as the case may be, both parties are relieved from those obligations which remain unperformed. I am of the view that the question posed, if tried separately, may dispose of the matter without the need to go for trial. If it is decided at the outset that the said agreement had expired through effluxion of time, neither party need to perform any of their obligations and neither party shall thereafter have any claim against the other. It was held in the case of *Carl Zeiss Stiftung* [1969] 1 Ch 93; [1968] 2 All ER 1002; [1968] 3 WLR 281, that an order should, therefore, be made for separate trial of a preliminary issue which if decided in one way, is likely to be decisive of the litigation, and it is not necessary that the decision should be such as to dispose of the entire action whichever way it is decided.

Thus, it is not necessary that if the plaintiff's application is allowed, and the court orders the preliminary issue as posed by the plaintiffs be tried first, and that the court decides in the affirmative, it must necessarily dispose of the action in its entirety. Order 33 r 5 states that after the trial of the preliminary issue, the court would still have a discretion in making any order as may be just. Be that as it may, O 15 r 16 of the rules provides:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

I have also been referred to the case of *Piercy v Young* (1880) 15 Ch D 475, where it was held, at p 479:

> Separate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds.

Are there any special grounds in the instant case? An order for the separate trial of separate issues is a departure from the beneficial object of the law that all disputes should be tried together and therefore, generally speaking, such an order should only be made in exceptional circumstances or on exceptional grounds (per Jessel MR in *Piercy v Young*). However, in the matter before me, it is clear that time was not merely the essence of the contract but fulfilment of the promise of the defendant to obtain the necessary approvals on or before 14 November 1984 was a condition precedent of the whole agreement. The necessary approvals were not obtained by the deadline and, therefore, it is highly probable that the agreement has become voidable, as provided for under s 56(1) of the Contracts Act 1950 which reads:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Under the provisions of the National Land Code 1965 the state authority or the land administrator, if delegated with the relevant powers, has a discretion whether or not to approve any application for sub-division of alienated land or for conversion of land use of any alienated land. If such land is situated within the area of jurisdiction of any local government, its approval is also necessary if a landowner wishes to develop such land. Both authorities are however under no obligation to approve any such application and without the necessary approvals, the landowner concerned cannot proceed further to develop his land. If the defendant had actually made submissions to the appropriate authorities for the necessary approvals but was unsuccessful at the end of the three years, I would think that under the terms of the agreement and by virtue of s 56(1) of the Contracts Act 1950, the plaintiffs should be in a position to terminate the said agreement and treat it as being void. To me, these would constitute special grounds for allowing the application.

In conclusion, I am of the view that the question posed is likely to be decisive of the litigation and I, therefore, allow the oral application of the plaintiffs. I also find that such an order has the beneficial effect of expediting the hearing of the substantial issue in the action, and as contended by counsel for the plaintiffs, would eliminate the need for discovery of documents and evidence on other issues and producing a substantial saving of costs. I accordingly order that the issue or question posed by the plaintiffs be tried at an early date convenient to both parties.

*Application allowed.*

Reported by Jeanne Tan